TUN DATU HJ. MUSTAPHA DATU HARUN

v.

TUN DATUK HJ. MOHAMMAD ADNAN ROBERT, YANG DI-PERTUA NEGERI SABAH & ANOR.

HIGH COURT BORNEO, KOTA KINABALU
TAN CHIAW THONG J
[SUIT NO. K. 467 OF 1985]
28 FEBRUARY 1985

CONSTITUTIONAL LAW: *Appointment of Chief Minister - Validity - Dismissal - Courts jurisdiction to inquire into validity of appointment - Constitution of the State of Sabah - Articles 6(3), 7(2), 10(2)(b), 72 - Federal Constitution - Articles 53, 63 - Indian Constitution - Doctrine of separation of powers - Standing orders of Parliament - Courts jurisdiction to question exercise of discretion by Head of State.*

An action was filed by the plaintiff challenging his removal from the post of Chief Minister of the province of Sabah and the appointment of the second defendant to that post.

The defendants raised a preliminary objection that the Court had no jurisdiction to hear the action. The grounds of objection raised were as follows:

(1) The issues raised by the plaintiff were not justiciable.

(2) The Court was not the correct forum for hearing the plaintiff's complaint.

(3) The declarations and injunction sought in the statement of claims were not issues on which the Court would grant declaratory orders or injunctions.

(4) The appointment of the Chief Minister is for the Yang Di-Pertua Negeri and subsequent to such appointment, the position of CM is a privilege of the Legislative Assembly, and this privilege had been exercised by the L.A. by a vote of confidence on 30 May 1985. Subsequent to that, on 3 August 1985, matters in relation to the appointment of the CM had been decided by the L.A., and therefore the Court should take cognizance of these and decline jurisdiction as a matter of principle.

(5) The jurisdiction of the Court to decide on issues raised in ousted as a result of the resolutions of 30 May 1985 and 3 August 1985 by Article 72 of the Federal Constitution.

(6) The principle of parliamentary democracy enshrined in the Federal and Sabah State constitutions is based on the separation of powers and therefore the Court should avoid any enquiry directly or indirectly which might lead to a conflict with the L.A.

(7) The issues raised in the statement of claim are now *ex post facto* and no longer issues that can be justiciable.

Held:

[1] On the first ground of objection:

The issue of dismissal and the alleged legal powers of dismissal as pleaded in the defence were issues that were legal and constitutional in nature, and were therefore issues that were justiciable and within the jurisdiction of the Court to try. If the issue was as to how the 2nd defendant exercised his discretion then the issue would not be justiciable. However the present issue is not of that nature. The issue was whether the alleged appointment was lawfully and constitutionally valid. Hence the issue was justiciable.

[2] On the second ground of objection:

The authority and function of the Head of State and the L.A. as conferred by the State Constitution were separate and distinct. It was no part of the authority and function of the L.A. to appoint the CM which authority fell exclusively within the powers and functions of the Head of State. Although the main issues in this action were legal matters some did have a political flavour, but this factor alone does not have the effect of ousting the jurisdiction of the Court. The confidence of the L.A. in any appointee of the Head of State as CM formed no part of this action, which basically but not exhaustively, included issues regarding appointment and dismissal, with other related issues.

[3] As regards the third ground of objection:

The Courts power to make declaratory judgments or orders was confined to matters which were justiciable, and the binding declarations the Court could make were declarations as to legal or equitable rights and not moral, social or political matters. The main issues involved in this action were legal and constitutional in nature and consideration of legal principles and the interpretation by the Federal and State Constitutions were concerned. If at trial the Court finds that on the issue of appointment, the contention of the plaintiff succeeds, this would mean that a legal right was involved. However although therefore the 3rd ground of objection fails whether such reliefs should in fact be granted would have to be considered at the trial.

[4] As regards the fourth and sixth grounds of objection:

It was too wide a proposition to state that the right to be a CM was a political right, as, by virtue of his appointment by the Head of State, he had a legal right to be the CM until that right was terminated by an adverse decision of the majority of members of the L.A. A distinction should be drawn between the legal right to be L.A. after appointment by the Head of State and rights enjoyed or exercised by a CM within the L.A. Although in principle the Courts have no power to interfere with the internal management of the L.A., those rights that were to be exercised out of the L.A. were under the protection of the Court. For the purposes of these proceedings, in matters falling within the province of the Courts to decide, any resolutions passed in the L.A. on the same matters would not bind the Court. It would be a startling and unacceptable situation if the position were otherwise as it would permit the L.A. to encroach on the province of the Courts and take over their functions. Although mention had been made that the power of appointment of the Head of State may be reserved power, the correct view would be to regard it as a Constitutional power. Under the state constitution the matter of "appointment" and that of "confidence of the L.A." were separate and distinct. The matter of appointment which was the issue in the case was not a matter of parliamentary privilege. There was no question of the Court declining jurisdiction.

[5] As regards the fifth ground of objection:

If the issues related to matters falling within the sphere of the Courts, such as the main issues here, the jurisdiction of the Court was not ousted by the resolutions. As discussed earlier the issues in this case fall within the matters to be decided by the Courts and not the L.A. In the premises the resolutions of the L.A. did not oust the jurisdiction of the Court to try this action.

[6] As regards the seventh ground of objection:

For the reasons given in the ruling on the other grounds, the action did not appear to have been brought to try a hypothetical case nor did it involve the Court in deciding a point of law which has become academic. This would suffice to dispose of this ground of objection.

[7] The Court has jurisdiction to try the case.

Cases referred to:

Republic of Bolivia v. Bolivian Navigation Company [1876] WR 361
Stephen Kalong Ningkan v. Government of Malaysia [1968] 1 MLJ 119
Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli [1966] 2 MLJ 187
Fan Yew Teng v. Government of Malaysia [1976] 2 MLJ 262
Dato Menteri Othman bin Baginda & Anor. v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29
Merdeka University Berhad v. Government of Malaysia [1981] CLJ (Rep) 191
Malone v. Metropolitan Police Commissioner [1979] 1 Ch 344
Madan Murari v. Choudhuri Charan Singh [1980] 67 AIR (Calcutta) 95
Dinesh Chandra Pande v. Chaudhury Charan Singh & Ors. [1980] 67 AIR (Delhi) 114
Jogendra Nath Hazarika v. State of Assam [1982] 69 AIR (Gauhati) 25
Bradlaugh v. Gossett [1884] 12 QB 27
The King v. Sir R.F.Graham-Campbell & Ors [1935] 1 KB 594
Republic of Italy v. Hambros Bank [1950] Ch 314
Howard v. Pickford Tool Co. Ltd. [1951] 1 KB 417
C. Shrikishen v. State of Hyderabad [1956] 43 AIR 186
Har Sharan v. Chandran Bhan Gupta & Ors.[1962] 49 AIR 301
Council of Civil Service Unions & Ors. v. Minister for the Civil Service [1984] 3 All ER 935
R.K. Nokulsana Singh v. Kishang Keising [1981] AIR (Gauhati) 47
Glasgow Navigation Co. v. Iron Ore Company [1910] AC 293
Tindall v. Wright [1922] 38 TLR 521

Legislation referred to:

Federal Constitution, arts. 53, 63, 72, (1)
Constitution of India [Ind], arts. 74, 75, (1), (3), 163(2), 164, (1), 226
Rules of the High Court 1980, O. 15 r. 6, O. 25 r. 5
State Constitution and the Legislative Assembly (Privileges Immunities and Powers) Enactment 1963, ss. 6(1), (3), 7(2), 10(2)(b)

For the plaintiff - Raymond Kidwell, QC, (Sri Ram and Abdul Razak Rouse with him); M/s. Rayner & Co.
For the 1st defendant - Dominic Puthucheary; M/s. Skrine & Co. Herman Luping; State Attorney-General, Sabah and Josie D. Bosi, State Counsel, Sabah
For the 2nd defendant - Dominic Puthucheary (Joannes Golokin with him)

JUDGMENT

Tan Chiaw Thong J:

The defendants through their learned senior Counsel have raised a preliminary objection, that the Court has no jurisdiction to hear this action and grant the reliefs sought by the plaintiff.

The grounds for the objection are as follows :

(1) That the issues raised by the plaintiff are not justiciable issues.

(2) That this Court is not the right forum for hearing the plaintiff's complaint, and that the principle of forum non conveniens applies.

(3) That the declarations and injunction sought in the statement of claim are not issues on which this Court will grant declaratory orders or injunctions.

(4) That the appointment of the Chief Minister is for the Yang Di Pertua Negeri and subsequent to such appointment, the position of the CM is a privilege of the Legislative Assembly, and this privilege has been exercised by the Legislative Assembly by a vote of confidence on 30 May 1985. Subsequent to that, on 3 August 1985. matters in relation to the appointment of the CM had been decided by the Legislative Assembly, and therefore the Court should take cognizance of these and decline jurisdiction as a matter of principle.

(5) That the jurisdiction of this Court to decide on issues raised is ousted as a result of the resolutions of 30 May 1985 and 3 August 1985 by Article 72 of the Federal Constitution.

(6) That the principle of parliamentary democracy enshrined in the Federal and Sabah State Constitutions is based on the separation of powers and therefore this Court should avoid any enquiry directly or indirectly which might lead to a conflict with the Legislative Assembly.

(7) That the issues raised in the statement of claim are now *ex post facto* and no longer issues that can be justiciable.

Learned senior Counsel for the plaintiff has contended otherwise.

The pleadings disclose that there are issues of fact and law. The Court has to decide whether, considered in the light of arguments of learned Counsel for the parties, such issues are justiciable and it is within the jurisdiction of the Court to try them.

The following facts are not in dispute :

(a) The plaintiff on 22 April 1985 following the holding of a general election for the Legislative Assembly of the State of Sabah, took an oath before the 1st defendant in the form prescribed for an oath to be subscribed by the Chief Minister of Sabah, as a member of the State Cabinet.

(b) The results of the general election are that Parti Bersatu Sabah (PBS) headed by the 2nd defendant secured 25 seats to which was subsequently added one more seat won by Ignatius Melanjum, making 26 seats; United Sabah National Organisation (USNO) led by the plaintiff 16 seats; and Parti Berjaya 6 seats. The number of elected seats is 48.

At the outset, I would deal with one matter. It was submitted by learned senior Counsel for the plaintiff that, on a preliminary matter, the Court should proceed on the basis that the facts alleged by the plaintiff are, or are deemed to be, correct. This contention was challenged by learned senior Counsel for the defendants, who argued that it was unnecessary for the Court to make findings of fact on relevant issues in considering the matters comprised in the grounds of objection. In this connection, it is to be observed that only such questions of law can properly be raised as preliminary issues as must necessarily arise in the action: see *Republic of Bolivia v. Bolivian Navigation Company* [1876] WR 361. In this respect, it need hardly be mentioned that some issues of law concerned in this action may possibly arise as a result of issues of fact raised. Accordingly, I shall adopt the same approach as in the *Republic of Bolivia's* case (*supra*).

The first ground of objection is that the issues raised by the plaintiff are not justiciable issues. In this connection, learned senior Counsel for the defendants has not specified what these issues are, but they must necessarily be issues raised by the pleadings. In this connection, consideration of the pleadings would appear to indicate that main legal issues that would necessarily arise in the action would include the following :

(1) The issue regarding the alleged appointment of the plaintiff as Chief Minister. This would include a finding whether, in law, the plaintiff was appointed which, in turn, would involve consideration of the issue relating to the circumstances regarding the taking of the oath by the plaintiff.

(2) The issue relating to what was alleged by the plaintiff as his dismissal by the 1st defendant, including the issue whether the latter has any power of dismissal.

(3) The issue regarding the appointment of the 2nd defendant as Chief Minister, which is related to the first two issues.

(4) The issue as to whether the discretionary power of appointment of the 1st defendant is subjective or objective in nature.

(5) The issues of conspiracy, misrepresentation, fraud and duress raised by the Defence in connection with the plaintiff's claim of appointment.

(6) The issue as to whether an instrument of appointment is necessary to render an appointment of the Chief Minister legally effective.

This list is not exhaustive, but is an indication as to what are included in the main issues.

Learned senior Counsel for the plaintiff has submitted that, in connection with the preliminary objection, the appointment of the plaintiff should not be an issue to be considered as this is not raised in the statement of claim. However, learned senior Counsel for the defendants has stressed that this issue is central to the case for the defendants, for if there is no appointment, no question of any dismissal of the plaintiff would arise. In this connection, as stated and for the reason given, I proceed on the basis that the issue of the alleged appointment of the plaintiff is an issue which, on the pleadings would necessarily arise in the action and thus should form a matter of consideration in relation to, in particular, this ground of objection.

In connection with this ground, learned senior Counsel for the defendants has submitted that, as the statement of claim has raised the issues of how the 1st defendant appointed, or had not appointed the Chief Minister, this would require him, as Head of State, to give evidence as to the state of his mind, or whether he had acted in good faith, or had been influenced by extraneous matters. This would lead to an unseemly state of affairs, as he would be examined on his powers and how he exercised them, especially on matters touching on his personal capacity on matters of State. Hence, the Court will be called upon to decide on the credibility and state of mind of the Head of State, and whether he had acted in good faith on matters raised in the Defence. It was submitted that these are not justiciable issues, in the same manner that His Majesty the Agong's action in making a Proclamation of Emergency is not justiciable. Further, to say that such matters are justiciable is to open the floodgates to every official act of the Head of State being questioned and this would reduce his high status, and also reduce his status to that of an ordinary citizen. In this connection, the case of *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 1 MLJ 119 was cited. Part of the headnote reads :

In his second action in the High Court at Kuching the petitioner claimed (a) that the proclamation of a state of emergency being made on the advice of the Federal Cabinet, was null and void in that it was not made *bona fide* but in fraudem legis, and (b) that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, was on that account null and Void. On 2 December 1966 Pike CJ (Borneo) holding *inter alia* that an action to declare a Federal law invalid required leave of a Judge of the Federal Court before commencement of proceedings, by virtue of Article 4 of the Federal Constitution, ordered certain paragraphs in the statement of claim struck out [1967] 1 MLJ 46). On 20 February 1967 leave was given by the Lord President for institution of proceedings against the Government of the Federation of Malaysia for a declaration that the said Act was invalid and/or that ss. 3, 4 and 5 thereof were invalid as being *ultra vires* the Federal Government. In his petition the petitioner alleged that no grave emergency had arisen in the State of Sarawak which could not be effectively dealt with under the previous proclamation of emergency made on 7 September 1964, that the Federal Cabinet well knew that no such emergency existed "whereby the security or economic life of Sarawak was threatened"; that the proclamation was in fraudem legis in that it was made not to deal with grave emergency whereby the security or economic life of Sarawak was threatened but for the purpose of removing the petitioner from his "lawful position as Chief Minister of Sarawak, and that the amendment of Clauses (5) and (6) of Article 150 of the Federal Constitution were null and void as *ultra vires* the Parliament and contrary, not only to Article 150 and Article 161E(2) of the Federal Constitution, but also the entrenched provisions in Article 41 of the Sarawak Constitution and relevant provisions in the Malaysia Act, 1963.

In that case, it was held by the Federal Court, by a majority, *inter alia*, that (1) it is incumbent on the Court to assume that the Government was acting in the best interests of the State and to permit no evidence to be adduced otherwise; (3) the circumstances which bring about a state of emergency are non-justiciable. In his judgment, Barakbah L.P. stated (at p. 122) :

In my view the question is whether a Court of law could make it an issue for the purpose of a trail by calling in evidence to show whether or not His Majesty the Yang di-Pertuan Agong was acting in bad faith in having proclaimed the emergency. In an act of the nature of a proclamation of emergency, issued in accordance with the Constitution, in my opinion, it is incumbent on the Court to assume that the Government is acting in the best interest of the State and to permit no evidence to be adduced otherwise. In short, the circumstances which bring about a Proclamation of Emergency are non justiciable.

The following passage appears in the judgment at the same page :

In my opinion the Yang di-Pertuan Agong is the sole Judge and once His Majesty is satisfied that a state of emergency exists it is not for the Court to inquire as to whether or not he should have been satisfied.

It was submitted that just as the action of the Agong in making a proclamation of an emergency is of such importance and central to the security of the country that it is not justiciable; so the appointment of a Chief Minister here is so central and vital to the political life of the State that it should not be justiciable. It was also emphasized that hence the matter of the exercise of the discretionary power of the 1st defendant as Head of State in the appointment of a Chief Minister should not be justiciable.

Learned senior Counsel for the plaintiff has contended that this is not a case where the Court cannot constitutionally interfere in respect of the matters complained of by the plaintiff, as in the *Stephen Kalong Ningkan's* case (*supra*). It was emphasized that, as far as the plaintiff was concerned, his case is based on what he contends is unlawful dismissal, with all the attendant consequences, as reflected in the reliefs sought; and on the question of dismissal, this does not involve the exercise of discretion of the 1st defendant as Head of

State, since this is a constitutional and legal issue which has been adjudicated upon in the case of *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli* [1966] 2 MLJ 187 without objection and hence this Court has jurisdiction to try such an issue. In this connection, I had earlier listed out, among the main issues to be tried in this action, that relating to the alleged dismissal of the plaintiff as Chief Minister. In my view, the issue of dismissal and the applicability of the *Stephen Kalong Ningkan's* case [1966] (*supra*) and alleged legal power of dismissal as pleaded in the Defence are issues that are legal and constitutional in nature, and are therefore, in my opinion, issues that are justiciable and within the jurisdiction of the Court to try them.

As to the issue of appointment, an important point to consider, in my view, is whether the issues to be tried include any issue giving rise to an examination as to how the 1st defendant had exercised his discretion on the matter of an appointment of the Chief Minister, and the factors he took into consideration in exercising such a discretion. If such an issue is involved, then, on the authorities, including that of the *Stephen Kalong Ningkan's* case [1968] (*supra*), it would appear that such an issue is not justiciable and the Court has no jurisdiction to try it. Indeed, this is conceded by learned senior Counsel for the plaintiff. However, in my view, the issue regarding the alleged appointment of the plaintiff as Chief Minister does not appear to be one of such a nature as has just been mentioned. The plaintiff alleges that he has been lawfully and constitutionally appointed, but this is denied by the defendants who contend that there was no appointment on the grounds that no instrument of appointment had been given and because the oath of office subscribed by the plaintiff resulted from conspiracy, misrepresentation, fraud and duress and hence any appointment is null and void, and can be annulled, rescinded, rectified, revoked, and dismissal can lawfully be made. Hence, in my opinion, the issues on appointment are not those regarding whether the discretion of the 1st defendant as the Head of State has been exercised lawfully and constitutionally; or what factors the 1st defendant took, or should take, into account in exercising his discretion on the appointment of the Chief Minister. Rather, they are issues as to whether there was in law an appointment, and this is related to the issues regarding the validity of the oath taken by the plaintiff; and whether the taking of an oath implies appointment. Hence, in my opinion, for the purposes of these proceedings, the principles established by the *Stephen Kalong Ningkan's* case [1968] (*supra*) are inapplicable to the issue of appointment there. Accordingly, I am of the view, and rule, that, on the pleadings, the issue of appointment is justiciable and the Court has jurisdiction to try this issue.

I have not lost sight of the inevitability of the 1st defendant as Head of State having to give evidence during the course of the trial on the issue of appointment. It is a matter of regret that this has to occur, but in the circumstances, unpleasant though the matter is, there appears to be no alternative but to face it. The first ground of objection, therefore, fails.

The second ground of objection is that this Court is not the right forum for hearing the plaintiff's complaint, and that the principle of forum non convenience applies. It was emphasized that the issue of who should be appointed the Chief Minister and enjoy the confidence of the Legislative Assembly (L.A.) is a political one, and that the proper forum to decide this is the L.A.; and that this issue could have been finally and decisively decided by the L.A. at its meetings held on 30 May and 3 August 1985; but the plaintiff and his followers chose to boycott these meetings. At this juncture, I would say a word about the resolution (Ex. D1) passed by the L.A. at its meeting on 3 August 1985. As rightly observed by learned senior Counsel for the plaintiff, this resolution does not form a subject-matter of the defence as yet, but arguments on it had been made by both parties. No doubt, procedurally, the matter would be put on a proper footing in due course.

In support of the second ground, learned senior Counsel for the defendants has cited three authorities. I shall deal with them in turn.

The first authority is the case of *Fan Yew Teng v. Government of Malaysia* [1976] 2 MLJ 262 and it was contended on that authority, that once a L.A. has dealt with a matter, in this case the matter of the appointment of the Chief Minister and who in that capacity commands the confidence of the majority of members, the Court should not interfere directly or indirectly, in the same matter. With respect, as a proposition, this in my view is obviously too wide, as the authority of the L.A. must necessarily be confined to matters within its constitutional and legal powers and functions. It is pertinent to observe that it is quite clear, under the Constitution of the State of Sabah (the State Constitution), the authority and function of the appointment of the Chief Minister after a general election is vested in the Head of State who, in performing that function, must appoint as Chief Minister a member of the L.A. who in his judgment is likely to command the confidence of a majority of the members of the L.A. (Article 6(3) of the State Constitution). I have not lost sight of the issue relating to the expression "majority of the members of the Assembly", but in my view, this is not a relevant issue in these proceedings. Under the State Constitution, whether the choice of the CM is the correct one can be tested in the L.A. which, if that august body disagrees with such choice, is at liberty to pass a motion of no confidence in the CM as appointed by the Head of State. Accordingly, in my view, in this respect, the authority and functions of the Head of State and those of the L.A. as conferred by the State Constitution, are separate and distinct. In my opinion, under the State Constitution, it is no part of the authority and function of the L.A. to appoint the CM, which falls exclusively within the powers and function of the Head of State. If, subsequently, a vote of no confidence is passed by the L.A. against the appointee, then it is open to him to either advise the Head of State to dissolve the L.A. and call for a fresh general election; or to tender his resignation to the latter (see Articles 7(2) and 10(2)(b) of the State Constitution), although the Head of State has discretionary power to withhold consent to a dissolution.

The headnote in the *Fan Yew Teng's* case (*supra*) reads :

> The plaintiff applied for various declarations arising out of his conviction for sedition and a fine of RM2,000 imposed on him in the High Court (1975) 1 MLJ 176). A motion had been introduced into the Dewan Ra'ayat that the question whether the plaintiff has become disqualified for membership of the House be referred to the Committee of Privileges. The plaintiff sought declarations in effect that he had a right to exhaust his legal right of appeal and to petition the Yang di-Pertuan Agong for a pardon before the Dewan Ra'ayat could take a decision in his disqualification; and that it was only the Dewan Ra'ayat and not the Committee of Privileges which could go into the question of his disqualification.
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> Held: (1) the decision on the issue of disqualification is for the Dewan Ra'ayat to take and when taken it is final and cannot be questioned in any Court;
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> (2) the Court cannot interfere with the right of the Dewan Ra'ayat to decide the question of the plaintiff being disqualified from membership and the reliefs sought by the plaintiff are outside the jurisdiction of the Court;
>
> (3) the Government of Malaysia cannot be a proper defendant from whom the reliefs sought, even if available, could be made, and therefore the Government was not a necessary party to the proceedings.

That case concerns the question whether the plaintiff has become disqualified for membership of the Dewan Ra'ayat, and in this connection, Articles 53 and 63 of the Federal Constitution provide as follows :

Article 53. Decisions as to disqualification.

If any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final:

Provided that this Article shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification)."

Article 63. Privileges of Parliament.

(1) The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any Court.

(2) No person shall be liable to any proceedings in any Court in respect of anything said or any vote given by him when taking part in any proceedings of either House of Parliament or any committee thereof.

In his judgment, Chang Min Tat J, said (at p. 266) :

The issue in his application is the right of the plaintiff to sit in the Dewan Ra'ayat and, in my view and with respect, this issue comes fully within the compass of Article 53 and Article 63. The issue therefore involves the proper and reasonable construction of these "Articles. The language is plain and unambiguous. Giving the words therein their plan and grammatical meaning, the decision on this issue is for the House to take, it is final when taken and the validity of the proceedings cannot be questioned in any Court. These Articles can admit of no other construction.

Thus, in that case, it was held that the Court had no jurisdiction to adjudicate upon the matters raised by the plaintiff, because they fell within the exclusive jurisdiction of the Dewan Ra'ayat. In my view, for the reasons already given, the matter of the appointment and, for that matter, the dismissal, of the Chief Minister, does not fall within the jurisdiction of the L.A. to decide. Hence, the *Fan Yew Teng's* case is of no assistance to the defendants.

The next case is that of *Dato' Menteri Othman bin Baginda & Anor. v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, the relevant part of the head-note of which reads:

In this case the respondent had applied for a declaration that the purported appointment by the first appellant of the second appellant as the new Undang of Jelebu was contrary to the adat, custom and constitution of the Luak of Jelebu. The appellants after filing their defence applied for an order that the statement of claim be struck out on the ground that the Court had no jurisdiction because the dispute involved a question of adat and custom of the Malays in the Luak and on the further ground in the case of the second defendant that under the Constitution of Negri Sembilan he as Ruling Chief enjoyed legal immunity in his personal capacity. The learned trial Judge dismissed the application of the appellants, holding that the Court had jurisdiction to entertain the action and that the second defendant did not enjoy legal immunity. The appellant appealed.

Held, by a majority (Suffian LP dissenting): (1) the Dewan Keadilan dan Undang is given power under the Constitution to advise on matters relating to Malay custom and as the Dewan in this case had blessed the appointment of the second defendant as the Undang of Jelebu, the Court should not attempt to usurp the function of the Dewan, which is a more suitable forum for discharging that function:

(2) the Court should decline jurisdiction on the ground that it is forum non conveniens and that there is another body which is more appropriate and which has been given power under the Constitution of the State to decide the matter.

It was submitted that the L.A. is the more appropriate forum to decide as to who should be the CM because, at one sitting, a decisive decision can be made to the dispute here once and for all. It was argued that judicial procedure and the Court are not the proper procedure and forum to make such a decision; further, that it is inappropriate for the Court to decide on a political issue, which the appointment of the CM is. It was also contended that such a political issue as is concerned in this case should be decided by the L.A., which is the proper forum to make such a decision. In the *Dato' Menteri Othman's* case (*supra*), the Federal Court, by a majority, held, *inter alia*, that it should decline jurisdiction to decide the matter in issue on the ground that it was forum non conveniens and there was another body which is more appropriate and which has been given power under the Constitution of the State of Negri Sembilan to decide such matter.

In my view, on the matter as to whether the Court is the proper forum to try and decide on the issues raised by the pleadings or whether it is forum non conveniens, let me say at once that the confidence of the L.A. in any appointee of the Head of State as CM forms no part of the issues in this action, which, basically but not exhaustively, include the issues regarding appointment and dismissal, with other related issues. Hence, the situation here is not similar to that which existed in the *Dato' Menteri Othman's* case (*supra*). I have given reasons as to why I considered that the issues of appointment and dismissal are justiciable issues and hence fall within the jurisdiction of the Court to try. Attention has been drawn to passages in the *Dato Menteri Othman's* case (*supra*) regarding principles relevant to the construction of constitutions; but here, the construction of the State Constitution in particular, falls within the jurisdiction and function of the Court.

As to whether the issues mentioned are political in nature, one would be naive, in my view, not to regard them as partly political, but, in my opinion, they are not wholly political in nature. Their trial and decision thereon, in my view, would involve construction of the Federal and State Constitutions, and consideration of legal principles; and the legal issues of misrepresentation, conspiracy, fraud and duress, all of which fall within the jurisdiction and function of the Court. Hence, I do not consider that the decision in the *Dato Menteri Othman's* case (*supra*) applies here.

The third case cited in connection with the second ground is that of *Merdeka University Berhad v. Government of Malaysia* [1981] CLJ (Rep) 191, [1981] 2 MLJ 356. The facts as appear in the headnote read :

> The plaintiff, a company limited by guarantee, submitted a petition to the Yang di-Pertuan Agong for an incorporation order for Merdeka University under s. 6 of the Universities and University Colleges Act, 1971. The petition was rejected and the Minister of Education announced that the rejection of the plaintiff's petition was for the following reasons: (a) Merdeka University would use Chinese as the medium of instruction; (b) it is meant to cater for students from Chinese independent secondary schools; (c) it is to be set up by the private sector; and as a composite for the basis of rejection that in effect its establishment would be contrary to the national education policy. The plaintiff requested a dialogue with the Minister but there was no response. The plaintiff issued a writ asking for a declaration that the rejection of the petition for the establishment of Merdeka University is null and void as it contravenes the Federal Constitution and for a declaration that the refusal of the petition to establish the University is an unreasonable and improper exercise of the discretion conferred by s. 6 of the Universities and University Colleges Act, 1971.

It was held, *inter alia* that "(10) the point taken by the plaintiff that the reasons for the rejection of the petition are incompatible with Article 26 of the Universal Declaration of Human Rights does not arise in this case and in any event the pertinent provisions for consideration

are those contained in municipal legislation. The Court's power to make declarations is confined to matters justiciable in the Courts and limited to legal and equitable rights and does not extend to moral, social or political matters," I do not consider that this case assists the defendants, as the main issues of appointment and dismissal and the other issues mentioned in the foregoing paragraphs are, in my view, legal matters, although, in the circumstances, some of them may smack of political flavour, but this factor alone, in my view, does not have the effect of ousting the jurisdiction of the Court. In the premises, the second ground of objection fails.

The third ground of objection is that the declarations and injunction sought in the statement of claim are not issues on which this Court will grant declaratory orders or injunctions.

At the outset, it is to be observed that, with the exception of reliefs (h) (costs of this suit), and (i) (further or other relief), reliefs (c) to (g) are dependant upon, and will necessarily follow, a decision as to whether (1) it falls within the power of the Court to grant and (2) whether the Court should grant reliefs (a) and (b) sought by the plaintiff. Reliefs (a) and (b) are as follows :

(a) a declaration that the First defendant's revocation of the plaintiff's appointment as Chief Minister on 22 April 1985 is *ultra vires* the Constitution, null and void and of no effect;

(b) a declaration that the plaintiff is the Chief Minister of the State of Sabah.

It was emphasized that it ultimately falls within the jurisdiction of the L.A. to decide who should be the CM and who as such, commands the confidence of the majority of members thereof and that the most that the plaintiff could hope for is a reasoned judgment of the Court as to who has the confidence of the L.A. Further, that what is involved here is a political, as distinct from a legal, right.

On the other hand, learned senior Counsel for the plaintiff has pointed out that the trend of the Courts is towards a more liberal attitude regarding judicial review of executive actions and the grant of declaratory orders; that a contrast should be made between a legal right and political issues; and that here, the former matter, and not the latter, is in issue, in respect of which the plaintiff is entitled to come to Court to have it tried.

On the factor of power to make declaratory orders, it is established that under O. 15 r. 6 of the Rules of the High Court, 1980 the Court's power to make declaratory judgments or orders is confined to matters which are justiciable, and the binding declarations which the Court can make under the rule are declarations as to legal or equitable rights and not moral, social or political matters: see *Malone v. Metropolitan Police Commissioner* [1979] 1 Ch 344; *Merdeka University Bhd. v. Government of Malaysia* (*supra*).

I have earlier expressed the view that the issues, although they may be said to be partly political in nature, nevertheless involve consideration of interpretation of the Federal and State Constitutions and that the main issues are legal ones both of which factors fall within the jurisdiction and function of the Court to deal with. On the issue of appointment which was stated to be a central feature in the case for the Defence, subject to it being tried, if the Court finds that the contention of the plaintiff succeeds, this would mean that a legal right is involved; and it is not, in my view, incompetent for the plaintiff to ask for the first two reliefs sought. Hence, with respect, I am unable to accept the argument that political issues and no legal right are involved in this respect.

It is true that, ultimately, it is the L.A. who has the power to decide who commands its confidence and hence who should continue to be CM, but, as pointed out earlier, this is not the issue here, and the main issues relate to appointment and dismissal which, for the reasons given, are justiciable issues. In my view, the facts and reliefs sought in the *Malone's* case (*supra*) are different and distinguishable. There, it was held *inter alia* that some of the declarations sought by the plaintiff did not relate to legal or equitable rights and hence the Court had no power to make, them; and with regard to some others, that the Court in its discretion would not make them.

Three Indian cases were cited in support of the third ground. In considering these cases, it should be borne in mind that the relevant constitutional provisions construed by the Indian Courts in those cases are not identical to ours, although they may relate to the same subject-matter.

The case of *Madan Murari v. Choudhuri Charan Singh* [1980] 67 AIR (Calcutta) 95, was concerned with, *inter alia*, the construction of Articles 74 and 75 of the Indian Constitution. Article 74 is not relevant here, while Article 75 relates to the appointment of the Prime Minister and other Ministers by the President of India, the collective responsibility of the council of ministers to the House, and the administration of the oath of office by the President to the ministers. The *Madan Murari's* case (*supra*) decided, *inter alia*, that in making the choice of the Prime Minister the President has to act in his own discretion and naturally he must take various factors into consideration and the primary factors is his assessment as to who as Prime Minister and which body of council of ministers will enjoy the confidence of the Parliament in terms of Article 75(3). But the President is not fettered in his choice except by his own assessment. Further, the Court could not sit in judgment on the political assessment of the President. Article 75(1) of the Constitution of India provides that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. The corresponding provision in respect of the appointment of the Chief Minister of a State is contained in Article 164(1) which contains a proviso which is not relevant here, and which states :

> The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the Governor.

It is thus apparent that the constitutional provisions in India corresponding to those in Article 6(3) of the State Constitution are not identical. For the purposes of these proceedings, I need not dwell upon the differences. Suffice it to say that the issues here are not concerned with whether the Head of State, in appointing the Chief Minister, had exercised his discretion properly, lawfully and constitutionally or what factors he took or did not take, into consideration when he made the appointment. As stated, the issue as to appointment relates to the question whether an appointment had been lawfully made. Hence, I am of the view that the decision in the *Madan Murari's* case (*supra*) has no application here.

The next Indian case cited is that of *Dinesh Chandra Pande v. Chaudhury Charan Singh & Ors.* [1980] 67 AIR (Delhi) 114. Part of headnote (A) reads :

> Political questions are unjustifiable by Courts. The main reason is that legitimate use of political power is generally non-justiciable since it has political sanction which is sufficient in view of the separation of powers between the executive, the legislature and the judiciary in the Constitution. But when it is alleged that political power has not been used in accordance with the Constitution or the law, the Courts have to examine if the issues are legal or political

and if the latter if they are justiciable or not (emphasis added) ... The Courts will not shun to decide seemingly political question when the Constitution or a statute has to be interpreted to answer them.

Part of paras. 8 and 9 of the judgment of Deshpande CJ read :

8. ... The doctrine of which we treat is one of "political questions", not one of "political cases". The Courts cannot reject as "no law-suit" a *bona fide* controversy as to whether some action denominated "political" exceeds constitutional authority.

9. Our Supreme Court has, however, had to decide seemingly political questions since the Constitution or a statute had to be interpreted to answer them, ordinarily a duty which Courts will not shun ...

I have reached the conclusion that the main issues involved in this action are legal and constitutional in nature, and consideration of legal principles and the interpretation of the Federal and State Constitutions are concerned. Hence, the decision in the *Dinesh Chandra Pande's* case, in my view, is of no assistance to the defendants.

Reference has been made in the course of argument to the letter dated 30 May 1985, addressed to the Head of State by the majority of the members of the L.A., expressing support to the 2nd defendant as the Chief Minister (see Fols. 39 to 44 of agreed bundle (A.B.). In my view, this has no bearing on the issues to be decided in these proceedings. In any event, that letter was dated some time after the date of the disputed appointment concerned in this action.

The 3rd Indian case cited is that of *Jogendra Nath Hazarika v. State of Assam* [1982] 69 AIR (Gauhati) 25. Part of headnote (A) reads :

... It is triflingly easy to raise questions touching one or the other provisions of the Constitution in every writ application and to contend that they are controversial questions relating to construction of constitutional provisions and no Rule should be issued. The real test is whether an arguable issue has been raised by the petitioner.

That case was concerned with *inter alia* construction of Article 226 of the Constitution of India relating to the jurisdiction of the High Court to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. However, even assuming that the case cited has any relevance, I have held that in this action, the main issues are not inarguable ones. Part of headnote (C) states :

... The repository of power to appoint Chief Minister and the Council of Ministers or to withdraw the pleasure contemplated under Article 164(1) and/or dismissal of the Ministry are exclusive pleasure-cum-discretion of the Governor. There is no limitation or condition of the unfettered pleasure prescribed in Article 164(1) ... There is no manner or method of withdrawal of his pleasure. There is nothing that it should be published in the official gazette.

I need comment no further on the difference in wording in Article 164(1) of the Indian Constitution and Article 6(3) of the State Constitution. Further, there is nothing in the State Constitution corresponding to what was provided in Article 163(2) of the Indian Constitution which reads:

163(2). If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

In my view, because of the difference in the reliefs sought in the *Jogendra Nath Hazarika's* case (*supra*) and the differences in the issues involved and the relevant constitutional provisions, I find that the decision in that case has no application here.

I need hardly reiterate that the second factor involved in the reliefs, particularly reliefs (a) and (b), sought by the plaintiff, that is, whether, assuming that it is within the power of the Court to make the declaratory orders and injunction sought, such reliefs should be granted, is, in my view, a matter that falls to be considered at the trial, and not at this stage of the proceedings.

In the result, I find that the third ground of objection fails.

I shall deal with the fourth and sixth grounds of objection together. The fourth ground is that the appointment of the Chief Minister is for the Yang di-Pertua Negeri and subsequent to such appointment, the position of the Chief Minister is a privilege of the L.A., and this privilege has been exercised by the L.A. by a vote of confidence on 30 May 1985. Subsequent to that, on 3 August 1985, matters in relation to the appointment of the Chief Minister had been decided by the L.A., and therefore the Court should take cognizance of these and decline jurisdiction as a matter of principle.

The sixth ground is that the principle of parliamentary democracy enshrined in the Federal and Sabah State Constitutions is based on the separation of powers and therefore this Court should avoid any enquiry directly or indirectly which might lead to a conflict with the L.A.

I have previously commented on the resolution of the L.A. dated 3 August 1985.

On the fourth ground, it was contended that the right to be CM is a political right and that the ultimate Judges are the elected representatives in the L.A. In this connection, with respect, in my view, while it may be true that, although appointed by the Head of State, whatever a Chief Minister can continue to be such would ultimately depend on whether he commands the confidence of the members of the L.A. - and, in this respect, there is nothing, including the State Constitution and the Legislative Assembly (Privileges, Immunities and Powers) Enactment 1963, to exclude nominated members - it is too wide a proposition to state that the right to be a CM is a political right, since, by virtue of his appointment by the Head of State, he has a legal right to be the CM until that right is terminated by an adverse decision of the majority of the members of the L.A.

The case of *Bradlaugh v. Gossett* [1884] 12 QB 27 was cited in support of the sixth ground. The headnote reads :

> The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a Court of law.
>
> A resolution of the House of Commons cannot change the law of the land. But a Court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do, viz., take the oath prescribed by the Parliamentary Oaths Act, 1866 (29 Vict. O. 19).
>
> An action will not lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; nor will the Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House.

a The plaintiff, having been returned as member for the borough of N., required the Speaker of the House of Commons to call him to the table for the purpose of taking the oath required by 20 Vict. c. 19. In consequence of something which had transpired on a former occasion the Speaker declined to do so: and the House, upon motion, resolved "that the Serjeant-at-Arms do exclude Mr. B. (the plaintiff) from the House until he shall engage not further to disturb the proceedings of the House.

b In an action against the Serjeant-at-Arms praying for an injunction to restrain him from carrying out this resolution:

Held, that, this being a matter relating to the internal management of the procedure of the House of Commons, the Court of Queen's Bench had no power to interfere.

Burdett v. Abbott (14 East, 148), and *Stockdale v. Hansard* (9 Ad. & E. 1) commented upon and approved.

c The following passage appears in the judgment of Stephen J (at p. 278) :

... I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, ...

d However, in the same judgment, a distinction was drawn between a right to be exercised within the House, and rights to be exercised out of and independently of the House. Thus, at p. 282, the same judgment states (at para. 1) :

We should have said that, for the purpose of determining on a right to be exercised within the House itself, and in particular the right of sitting and voting, the House and the House only could interpret the statute; but that, as regarded rights to be exercised out of and
e independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House.

Later, in the same judgment, the following passage appears (at p. 286, para. 1) :

Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shown in many cases, will apply proper remedies if they are in any way invaded, and will in so doing be bound, not by resolutions of either House of Parliament, but
f by its own judgment as to the law to the land, of which the privileges of Parliament form a p Article Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case, such rights must be defendant upon the resolutions of the House.

Hence, a distinction should be drawn between the legal right to be CM outside the L.A., after appointment by the Head of State, and the rights enjoyed or exercised by a CM within
g the L.A.

The case of *The King v. Sir R.F. Graham-Campbell & Ors.* [1935] 1 KB 594 was also cited. The headnote states:

The House of Commons has the privilege of regulating its own internal affairs and procedure, including the sale, within the precincts of the House, of intoxicating liquor without a licence,
h through its employees in the refreshment department of the House.

The applicant applied in the police Court for summonses against certain members of the Kitchen Committee of the House of Commons and the manager of the refreshment department of the House on the ground that they had on two occasions unlawfully sold by retail intoxicating liquor for the sale of which they did not hold a justices' licence as required by s. 65 of the Licensing (Consolidation) Act 1910. The Magistrate held that, assuming that there
i had been a sale of liquor without a licence, his jurisdiction was excluded by the privileges of

the House and he declined jurisdiction. Rules *nisi* having been obtained by the applicant for orders in the nature of *mandamus* calling on the Magistrate, the members of the kitchen committee affected and the manager of the refreshment department to show case why the Magistrate should not proceed to hear and determine the applications for the summonses:

Held, that in the sale of liquor in the precincts of the House without a licence, the House was acting, through its kitchen committee and its employee, the manager of the refreshment department, in a matter which fell within the scope of the internal affairs of the House and, therefore, within the privileges of the House so that no Court of law had jurisdiction to interfere.

It was emphasized that this case is an illustration of how wide the privileges of the House are (see p. 597, last para. and p. 598, 2nd para). In this connection, it is to be noted that unless otherwise expressly provided, the L.A. and members thereof respectively enjoy the same privileges and immunities and powers as are enjoyed by the House of Commons and the members thereof (see s. 6(1) of the Legislative Assembly (Privileges, Immunities and Powers) Enactment 1963).

However, it should be noted that the decisions in the preceding two cases mentioned are confined to matters of internal management of the procedure of the House and the privilege of regulating its own internal affairs, and whether certain acts fell within the scope of such matters. Here, while one of the main issues relates to appointment of the CM, the right of the L.A. to pass the resolutions of 30 May 1985 and 3 August 1985 respectively is not being questioned. In this connection, it is to be observed that, while standing order. 21(1)(g) of the standing orders of the L.A. prohibits the asking of any question on any matter that is sub judice, there is no similar provision in the standing orders in relation to the moving and passing of resolutions. Be that as it may, the relevant point to consider is whether, in the absence of any challenge, while it may be within the privileges of the L.A. to pass the resolutions of 30 May 1985 and 3 August 1985 respectively, they are binding on the Courts. In my view, for the purposes of these proceedings, in matters falling within the province of the Courts to decide, any resolutions passed in the L.A. on the same matters do not bind the Courts. It would be a startling and unacceptable situation if the position were otherwise, as is apparent. To take a simple illustration, if this proposition is not correct, it would mean in effect that the L.A. may encroach on the province of the Courts and take over their functions. The falsity of such a converse proposition is self-evident.

In my view the cases of *Republic of Italy v. Hambros Bank* [1950] Ch. 314 and *Howard v. Pickford Tool Co. Ltd.* [1951] 1 KB 417 are of no assistance since the one confirms the principle that declaratory orders may be made by the Court only if the subject-matter of litigation is cognizable or justiciable in the Court; and the other decided that the jurisdiction conferred on the Court by O. 25 r. 5 (now O. 15 r. 16) should not be used to answer academic questions. Neither situation exists here.

Paras. (b) and (c) of the headnote in the case of *C. Shrikishen v. State of Hyderabad* [1956] 43 AIR 186 read :

(b) ...
There is no jurisdiction in the High Court to issue any writs against a Legislature of Parliament or the Speaker or any officer of these Assemblies. And further, neither a Writ of Prohibition nor a writ of *certiorari* nor a writ of *Mandamus* will lie to restrain the State Legislature or Parliament from enacting any legislation even if it is *ultra vires* their powers.

A Court has no general or roving superintendence over an undefined field, nor is it its function to declare void or directly annul a law immediately it is promulgated unless its interpretative function is sought by any person or party who challenges that law as having infringed his

rights on the ground of its being *ultra vires* of the powers of the legislative body. 1928 KB 411. Rel. on.

(c) ...

A Speaker of Parliament or Legislature or a Chairman of the Rajya Sabha are officers within the meaning of Article 122 or 212. Ministers of the Government whether of the Centre or of States are also members respectively of Parliament or Legislature; as such the Courts cannot interfere with them in the part they play in the proceedings or business of the Assemblies nor can they interfere with their privileges, as the rights of any of them to introduce any Bill in their respective Assemblies are rights and privileges of those members whether as members or as Ministers. There is an inherent right in the Legislatures to conduct their affairs without any interference from any outside body.

However, as already expressed, there is no issue here relating to any challenge made to the power, right or privilege of the L.A. to conduct its business or affairs, including the passing of laws and the introduction and passing of resolutions.

Para. (f) of the headnote in the case of *Har Sharan v. Chandra Bhan Gupta & Ors.* [1962] 49 AIR 301 states :

(f) Constitution of India, Article 226 - Principle of judicial review - Court will not comment on executive acts which do not violate the law or the Constitution.

The executive and the judiciary are independent of each other within their respective spheres. Each is conversant with the peculiar circumstances within its own sphere and his special knowledge of complicated questions which is denied to the other. Each must have the fullest discretion in the discharge of its duties. The acts of the executive are not open to review by the judiciary as long as there is no violation of the law or the Constitution. It follows that the Court should not ordinarily comment on any act of the executive unless the act is such that it is likely to promote disrespect for the law. The Court must extend the same courtesy to the other branches of government, which it receives from them and refrain from making uncalled for comments on the wisdom of the acts of the ministers of government.

In this connection, it should be borne in mind that this action does not involve a review of the acts of the executive, but concerns mainly issues involving consideration as to whether, constitutionally and in law, the plaintiff was appointed CM, and legal issues regarding alleged misrepresentation, fraud, duress and conspiracy against the plaintiff. The issue on dismissal would involve consideration as to whether the State Constitution has been violated. Hence, in my view, the *Har Sharan Varma's* case (*supra*) has no application here. However, paras. 26 and 27 of the judgment of S.S. Dhavan J in that case may be worthy of note. They read as follows :

(26) The Court's jurisdiction does not extend to every kind of improper exercise of power conferred by the Constitution. Impropriety may be either legal or political in nature. In the former case the Court will interfere, in the latter it cannot.

(27) The constitution of parliamentary democracy has been compared to a floating iceberg, as it consists of parts which are written and visible and others which are unwritten and invisible but cannot be ignored without imperilling the democratic process itself. The written text of the Constitution which distributes the powers of government between its different branches and regulates the manner of its exercise is the visible part of the Constitution. If the provisions of the Constitution are violated, the Courts can interfere. It for example, government pass a law infringing the fundamental rights of a citizen in violation of Article 13, or the State imposes a tax which it is not authorised to do, or the Governor nominates as member of the Council a person who is not a citizen of India, the remedy lies in the law Courts.

As to the quotation made by learned senior Counsel for the defendants from Zamir on the declaratory judgment (1962) at p. 42, relating to extra-legal issues, that is, issues that are not of a legal, but of a moral, social or political character, I have dealt with this aspect of the matter when considering the third ground of objection regarding the making of declaratory orders and injunctions.

Emphasis has been laid on the case of *Council of Civil Service Unions & Ors. v. Minister for the Civil Service* [1984] 3 All ER 935 and, in particular, to the view expressed in the judgments of Lords Scarman, Diplock and Roskill in that case that powers exercised directly under the prerogative are not by virtue of their prerogative source automatically immune from judicial review. If the subject-matter of a prerogative power is justiciable then the exercise of the power is open to judicial review in the same way as a statutory power. However (per Lord Roskill), prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers are not justiciable or reviewable. In this connection, the first observation I would make is that, in my view, this action is not concerned with judicial review of the exercise of prerogative power. At the risk of repeating myself, a main issue concerns the question as to whether the plaintiff has been legally appointed CM or not and if so, whether such an appointment is vitiated by conspiracy, misrepresentation, fraud or duress; and further, another main issue is that relating to dismissal, although this issue is related to that of appointment. In any event, the opinion in the judgment of Lord Roskill was expressed obiter. Mention has been made that the power of appointment of the Head of State may possibly be described as a reserved power. However, having regard to the fact that the power of appointment is vested in the Head of State by the State Constitution, such power, in my view, may more properly be described as a constitutional power, although the State Constitution also states that such power is discretionary, subject to the two factors mentioned in Article 6(3) which the Head of State must take into consideration.

For the purposes of these proceedings, I do not propose to deal with the case of *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli* [1966] 2 MLJ 187, as it concerns the question of dismissal.

It should be remembered that the appointment of the 2nd defendant as CM, as such, is an issue in so far as it is related to the claim of the plaintiff that he had been validly appointed CM previously and that his purported dismissal is unconstitutional, null and void. If the plaintiff succeeds in his claim to reliefs (a) and (b), it necessarily follows that the appointment of the 2nd defendant as CM would be adversely affected, as it is common ground that there is no provision in the State Constitution for the appointment of two CM's. The plaintiff is also alleging breach of the State Constitution in the matter of what he claims to be his dismissal as CM considered in this light, I do not regard that the case of *R.K. Nokulsana Singh v. Kishang Keising* AIR 1981 Gauhati 47 assists the defendants. The Articles of the Indian Constitution concerned in that case are Articles 226 and 164, to which I have referred previously, with the observation that the provisions of the latter Article are not identical to the corresponding provisions in the State Constitution. Further, this is not a case involving the consideration whether the CM has been appointed according to the practice of parliamentary democracy. In a nutshell, the main dispute is: who is the lawful and rightful CM, involving issues of whether the plaintiff was lawfully dismissed.

The futility of the Courts getting involved in cases having political flavour was stressed. In this connection, I would echo the view expressed by Tun Suffian, the former LP in his dissenting judgment in the case of *Dato Menteri Othman Bin Baginda & Anor v. Dato' Ombi Syed Alwi Bin Syed Idrus* (*supra*) where, at p. 39, he stated:

> Whether or not the Undang has been validly elected is of course a delicate question, and a political question which is best solved by political means: but if the constitution and law require, as I think they do, that the matter be resolved by the Court, then until the constitution has been suitably amended, the Court has no alternative but to embark on the task as best as it can ...

Further, the Courts will not shun to decide seemingly political questions when the Constitution or a statute has to be interpreted to answer them (see the *Dinesh Chandra Pande's* case (*supra*)).

In support of the argument that the appointment of the CM is a matter of parliamentary privilege, it was contended that the position of the CM is so vital to political life that no L.A. can function without him. Hence, it is self-evident that it is a privilege given to the L.A., subsequent to his appointment, to decide who carries on as CM and whether the appointment was right or wrong. The machinery of parliamentary democracy is such that the appointment must go back to the L.A. In this connection, it is obvious that, under the State Constitution, the matter of "appointment" and that of "confidence of the L.A." are separate and distinct: While it is for the Head of State to appoint the CM, with which function the L.A. is not constitutionally concerned, whether subsequently the appointee of the Head of State commands the confidence of the majority of the members of the L.A., is for the members of the L.A. to decide. The matter of appointment, with which we are here concerned, is therefore, in my view, not a matter of parliamentary privilege, although subsequently, the L.A. has the final say as to whether the appointment is endorsed by the majority of the members thereof and whether the appointee should continue as CM.

We pride ourselves in adopting the system of government based on parliamentary democracy, which is based on the principle of the separation of powers among the legislature, the judiciary and the executive. So long as this vital principal is practised and maintained, as is being done, the proper functioning of government is ensured.

In the premises, there is no question of the Court declining jurisdiction or avoiding any enquiry directly or indirectly which might lead to a conflict with the L.A.

This disposes of the 4th and 6th grounds of objection.

I come now to the 5th ground, which is that the jurisdiction of this Court to decide on the issues raised is ousted as a result of the resolutions of 30 May 1985 and 3 August 1985 by Article 72 of the Federal Constitution.

Article 72(1) of the Federal Constitution stipulates that "The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any Court." It is pertinent to consider what the word "validity" implies here. As already noted, there is no challenge here on the passing of the two resolutions mentioned by the L.A. If they concern matters relating to internal management or the internal affairs and procedure of the L.A., then, on the authorities, the matters with which they are concerned are not justiciable and it does not fall within the jurisdiction of the Court to adjudicate upon them. Examples are the *Fan Yew Teng's* case, the *Bradlaugh's* case and *Sir Graham-Campbell's* case. However, if they relate to matters falling within the sphere of the Courts, such as the main issues here, regarding which I have already dealt with, then obviously the jurisdiction of the Court is not ousted by these resolutions. I think that I have given enough expression on the matter and need say no more. In my view, as was rightly pointed out by learned senior Counsel for the plaintiff, most of the items in the resolution of 3 August 1985 concern issues which fall to be decided by the Court in this action, particularly items (i), (ii) and (iii), issues which, for the reasons

already given, do not, in my view, fall within the jurisdiction of the L.A. to decide. As to the resolutions of 30 May 1985, if they are to be construed as having a similar effect, then the same situation applies.

In the premises, I rule that the resolutions of the L.A. dated 30 May 1985 and 3 August 1985 do not oust the jurisdiction of the Court to try this action.

The last and 7th ground, which I shall dispose of shortly, is that the issues raised in the statement of claim are now *ex post facto* and no longer issues that can be justiciable. This ground is related to the 5th which has just been dealt with and in the light of my ruling on that ground, the conclusion on this ground is obvious. However, the cases of *Glasgow Navigation Co. v. Iron Ore Company* [1910] AC 293, and *Tindall v. Wright* [1922] 38 TLR 521 were cited in support of this ground. The headnotes of these cases are short and they respectively state:

> Action dismissed when it appeared to the House to have been brought to try a hypothetical case. No costs.; and
>
> The Court will not decide a point of law which has become academic, even though both parties are anxious to have it determined, and though it is a matter of public importance on which a Government Department desires the guidance of the Court with a view to introducing amending legislation if necessary.

For the reasons given in my ruling on the other grounds of objection, I rule on this ground, that this action, in my opinion, does not appear to have been brought to try a hypothetical case; nor does it involve the Court deciding a point of law which has become academic. That suffices to dispose of this ground of objection.

For the reason given, therefore, I rule that the Court has jurisdiction to try this action.

Also found at [1988] 2 CLJ 330